NO. 15-5211

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

M. KATHLEEN MCKINNEY, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

PETITIONER – APPELLEE,

V.

OZBURN HESSEY LOGISTICS, LLC,

RESPONDENT – APPELLANT.

On Appeal From the United States District Court for the Western District of Tennessee
Case No. 2:14-CV-02445

REPLY BRIEF OF APPELLANT OZBURN HESSEY LOGISTICS, LLC

Ben H. Bodzy (TN Bar No. 23517)
bbodzy@bakerdonelson.com
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
211 Commerce Street, Suite 800
Nashville, TN 37201
Telephone: (615) 726-5640

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

ARGUMENT

I. THE BOARD DISINGENUOUSLY ASSERTS THAT MOOT ISSUES SUPPORT THE 10(J) INJUNCTION.

Throughout its brief, the Board[1] repeatedly references moot issues in support of its argument that the 10(j) injunction was "just and proper." Specifically, the Board references the "uncontested ordered reinstatement of Ishmon, Wade, and Williams" that "OHL does not contest in the current appeal." (Br. 23, 50). The Board further asserts that "OHL is not contesting the majority of the injunctive provisions." (Br. 50). The clear implication of these statements is that since the provisions regarding Ishmon, Wade, and Williams are not at issue in this appeal, OHL has conceded that injunctive relief was just and proper. But that is incorrect.

It is disingenuous for the Board to represent to this Court that the reinstatement of Ishmon, Wade, and Williams, as well as the injunctive provisions related thereto, were uncontested by OHL. OHL did not abandon those issues on appeal or concede them at any time. Rather, Ishmon, Wade, and Williams have voluntarily left their employment with OHL or chosen not to accept reinstatement, rendering the injunctive relief ordered with respect to them – reinstatement with OHL – moot. As a result, OHL and the Board agreed to narrow the issues on appeal to address only the 10(j) injunction as to Jones and Smith. Indeed, the

[1] References to the "Board" in this Reply Brief are intended to mean Petitioner-Appellee M. Kathleen McKinney, Regional Director of Region 15 of the National Labor Relations Board, who brought this case on the Board's behalf.

parties submitted a Joint Motion to Limit the Scope of Appeal and Amend Briefing Schedule on May 19, 2017, in which the parties agreed that the provisions of the Amended Injunction Order related to Ishmon, Wade, and Williams "are now moot and no longer in dispute." (Doc. No. 36, ¶ 6). This was so because of "the voluntary departure of some of the OHL employees who were reinstated pursuant to the injunction." (Doc. No. 36, ¶ 6). Prior to submitting the Joint Motion to Limit the Scope of Appeal, OHL had already briefed those provisions on appeal.

The Board's references to the relevant injunction provisions as "uncontested" is misleading. If Ishmon, Wade, and Williams were currently employed by OHL, OHL would be pursuing its appeal and other remedies with respect to those injunction provisions. As those individuals are no longer associated with OHL by their own volition, those injunctive provisions were mooted. Respectfully, the implications by the Board that OHL has somehow conceded or admitted culpability at any time through its disingenuous references to "uncontested" provisions in the Amended Injunction Order must be disregarded.

II. THE DISTRICT COURT ERRED IN FINDING THAT A 10(J) INJUNCTION WAS JUST AND PROPER.

To order injunctive relief under Section 10(j), a court must find reasonable cause to believe unfair labor practices have occurred and must also find that the requested relief is just and proper. *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). Section 10(j) relief must be "reasonably

necessary to preserve the ultimate remedial power of the Board and is not to be a substitute for the exercise of that power." *Gottfried v. Frankel*, 818 F.2d 485, 494 (6th Cir. 1987). "The primary concern under the just and proper inquiry is whether such relief is necessary to return the parties to [the] status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA, and whether achieving [the] status quo is possible." *Shaub v. Fivecap, Inc.*, 125 F.3d 856 (6th Cir. 1997).

A. An Injunction is Not Necessary to Preserve the Board's Remedial Powers.

The Board gives short shrift to the fact that injunctive relief as to Jones and Smith is not just and proper because it is not necessary to preserve the ultimate remedial power of the Board. As noted above, the just and proper inquiry is primarily concerned with whether the Board's remedial powers will ultimately be thwarted if an injunction is not entered to preserve the status quo. Here, the Board offers little substance to support that any organizing or bargaining activities will be impacted if the temporary injunction is dissolved.

As an initial matter, the alleged unfair labor practices at issue in this appeal and the underlying injunction only involve the change of job duties for Smith and the discharge of Jones. The Board makes a litany of unsupported references to other allegations of unfair labor practices, but those issues are not on appeal here. The principal question for the Court with respect to whether injunctive relief was

just and proper in this case, and therefore whether it could be ordered, is how the Board's remedial power would be nullified in the absence of an injunction as to Smith or Jones. And further still, how would organizing activities or collective bargaining be impacted in the absence of an injunction as to Smith and Jones?

The Board does not answer these questions because it cannot. Indeed, the only impact the Board cites to is a totally speculative and unsupported harm that the reassignment of Smith and discharge of Jones have created a chilling effect that threatens irreparable harm to the collective bargaining process. The only evidence offered by the Board in support of this assertion is generalized evidence that "attendance at Union meetings dropped" and that the union "had a difficult time signing up new employees" after the May 2013 ballot count. (Br. 46-47). Bearing in mind that the issues before the Court involve only Smith and Jones, the evidence is insufficient to link actions taken regarding Smith and Jones to any alleged chill.

As noted in OHL's principal Brief, it is a matter of common sense that alleged unfair labor practices cannot have a chilling effect on employee rights where those unfair labor practices are not known to other employees. It is mere speculation for the Board to assert that the injunction as to Smith and Jones is necessary to prevent chilling of employee rights now that more than four years have passed since the ballot count and the parties are now engaged in collective bargaining. There is no evidence to show any threat of chill here. *See e.g. Szabo v.*

*P*I*E Nationwide, Inc.*, 878 F.2d 207, 210 (7th Cir. 1989) (reversing district court grant of § 10(j) relief on ground that allegedly retaliatory firing of one employee does not warrant interim injunction requiring reinstatement because chilling effect on filing of grievances by other employees is pure speculation in absence of showing of pattern of retaliatory terminations); *Eisenberg v. Lenape Products, Inc.*, 781 F.2d 999, 1005 (3d Cir. 1986) (Section 10(j) relief is inappropriate where "there is no evidence in the record to establish that other employees will be discouraged from engaging in concerted activity in the interim.").

And while Section 10(j) relief is in itself an extraordinary remedy, reinstatement of discharged employees is not necessary to preserve the Board's remedial powers. "[R]einstatement of unlawfully discharged employees . . . are matters generally left to the administrative expertise of the Board." *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1192 (5th Cir. 1975). That is so because Section 10(j)'s scope should not supplant the Board's orderly procedures. *Id.* In *Boire*, for example, the Fifth Circuit concluded that the district court had not erred in refusing to order reinstatement of two employees who had allegedly been discharged for union activity. *Id.* There, the Board had waited three months before petitioning the district court for an injunction. *Id.* The Fifth Circuit concluded that reinstatement was inappropriate because the delay in seeking injunctive relief was "evidence that the detrimental effects of the discharges have already taken their toll

on the organizational drive." *Id*. Thus, concluded the Fifth Circuit, "[i]t is questionable whether an order of reinstatement would be any more effective than a final Board order at this point." *Id*.

In this case, as OHL pointed out in its opening Brief, the Board delayed for years before seeking the instant injunctive relief. Any chilling effect as a result of the alleged unfair labor practices relating to Smith and Jones would have long since "taken their toll on the organizational drive." Indeed, there are no ongoing organizing activities. While collective bargaining is currently underway, the Board's evidence does not speak to how the injunctive provisions relative to Smith and Jones are necessary to preserve the collective bargaining process. Thus, there is no basis to conclude that an injunction would be any more effective than a final Board order at this point or that injunctive relief is necessary now.

Furthermore, an "application for [10(j)] relief is not acting on behalf of individual employees, but in the public interest." *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 907-07 (3d Cir. 1981). "That interest is in the integrity of the collective bargaining process." *Id*. Thus, the question is how reinstatement of an individual employee would be necessary to, for example, maintain the status quo during bargaining or organizing activities. It may be necessary to reinstate workers "so as to prevent the destruction of employee interest in collective bargaining, irreparable injury to the union's bargaining power,

and the undermining of the effectiveness of any resolution through the Board's process." *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 856 (5th Cir. 2010).

Reinstatement may be ordered in limited circumstances where the alleged unfair labor practices threaten to destroy union organizing efforts either by removing a "large nucleus" of union supporters or by removing key organizers. *Id*.; *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001) ("The absence of key union organizers can contribute to the erosion of support for a nascent union movement."). There is no evidence or argument to support that the change in job duties of Smith or the discharge of Jones destroyed a "large nucleus" of union support or that Smith or Jones were key union organizers. There is no evidence whatsoever to show that the change in job duties of Smith or the discharge of Jones had any impact whatsoever on the bargaining unit. Thus, there was no basis for the District Court to find that such exceptional relief was just and proper in this case.

Contrary to the Board's assertion, the voluntary disassociation of three other employees from OHL does not make the injunction any more imperative. In other words, because Ishmon, Wade, and Williams have resigned their positions at OHL or declined to accept reinstatement, the Board appears to contend that injunctive relief as to Smith and Jones is necessary to prevent further erosion of union support. But the absurdity of the Board's argument is readily apparent. Section 10(j) is not designed to protect unions from erosion by voluntary departures from

the bargaining unit. There is no evidence (and notably, no argument by the Board) that the departures of Ishmon, Wade, or Williams were caused by OHL.

The Board cannot explain why the injunction is necessary, especially now that the union has been certified and collective bargaining is ongoing. There is no evidence that the alleged unfair labor practices at issue in this case - the change in job duties of Smith and the discharge of Jones - actually had any chilling effect on the exercise of employee rights. And even if there had been any chill, it has long since dissipated due to the passage of several years since the alleged unfair labor practices. In this case, the Board's remedial powers are not at risk as to warrant the extraordinary relief of a Section 10(j) injunction. The District Court therefore erred in finding that the injunctive relief was just and proper.

B. The Board's Evidence of Chill is Insufficient to Show that Injunctive Relief is Just and Proper

Even if the Board could point to some concrete impact on bargaining or organizing as a result of the alleged unfair labor practices related to Smith and Jones (and it cannot), its evidence of chill is woefully inadequate to support a Section 10(j) injunction. The only evidence of any alleged chill offered by the Board is generalized evidence that "attendance at Union meetings dropped" and that the union "had a difficult time signing up new employees" after the May 2013 ballot count. (Br. 46-47). The Board contends that this evidence is not stale because "these accounts covered the time period immediately following the unfair

labor practices in May 2013 to the time leading up to the filing of the § 10(j) petition in June 2014." (Br. 47).

In apparent recognition of the weakness of its evidence, the Board glosses over several critical facts regarding its evidence of chill. First is that affidavits from Wells, Whitley, and Heron, upon which the Board relies to argue that union support dropped after the May 2013 ballot count, are irrelevant to the alleged unfair labor practices related to Smith and Jones. Wells, Whitley, and Heron worked in separate OHL accounts from Smith and Jones such that they could not have had any knowledge of alleged chilling in the Browne-Halco account, where Smith and Jones worked. The Board fails to even address this critical fact.

In addition, the chilling evidence offered by the Board remains untimely. ***The chilling evidence relates strictly to May and June of 2013. Jones was discharged in October 2013, such that his discharge could not, as a matter of fact or law, caused any chill in union participation in May or June, several months earlier. Likewise, Smith's job duties were changed in June of 2013, which could not have caused any alleged chill in May of 2013.*** Regardless, none of the Board's evidence of chill is sufficient to establish that the change in job duties of Smith or the discharge of Jones actually caused any chill.

The Board also fails to fully address the fact that union participation may decline for a myriad of reasons, instead simply rejecting this argument as

speculation. But it is not mere speculation. OHL pointed to specific portions of the Board's own evidence that showed that chill was attributable to other sources than actions taken as to Smith and Jones. Not only is such evidence not speculative,[2] but it is also relevant. For an injunction under Section 10(j) may only issue where the relief sought is just and proper, meaning that it is necessary to preserve the Board's remedial powers because of threats to the collective bargaining or organizing process. If the evidence shows that declining union participation or reticence to support the union are a result of other external factors, it is a logical corollary that injunctive relief is not warranted as to the alleged unfair labor practices that did not cause the alleged chill. Thus, the relief sought here is not just and proper because the Board's evidence does not show that any alleged chill, either at the time of the injunction or now, is the result of the alleged unfair labor practices at issue.

Despite the Board's attempts to confuse this Court by constantly referring to a myriad of alleged irrelevant allegations against OHL over a vast span of time, the Court must not lose sight of the fact that there are only two injunction provisions at issue in this appeal. Those are related to the change in job duties for Smith and the discharge of Jones. It is folly for the Board to assert that the Court cannot look at

[2] The Board asserts on the one hand that OHL's argument that the declining interest in the union may be attributable to other sources than alleged unfair labor practices is speculative, but then expects this Court to rely on generalized affidavits that union interest decreased after the May 2013 ballot count but before the alleged unfair labor practices occurred. The Board's assertion is no less speculative than OHL's argument.

these alleged unfair labor practices individually to determine whether either instance resulted or threatened to result in any chill of employee rights. That is the Court's most important consideration. If there is no threat that the alleged unfair labor practices could now chill employee rights, then injunctive relief is not just and proper. No evidence of any threat to bargaining or organizing only leads to one conclusion: the Board's administrative process must be allowed to run its course.

C. The Board's Delay in Seeking Relief

The Board waited almost two years after the initial unfair labor practice allegations before seeking injunctive relief. It waited over a year after the vast majority of the allegations were presented to it before seeking interim injunctive relief. The administrative process is no excuse here. Such an inordinate delay is inconsistent with the type of urgent and immediate relief afforded by Section 10(j). Indeed, if any chill did occur as a result of alleged unfair labor practices against Smith and Jones, it would have long since dissipated by the time the Board got around to seeking injunctive relief. Delay in seeking injunctive relief is important because it shows not only that the relief sought is not urgent, but also that it is unnecessary because the union would not gain any benefit from injunctive relief:

> [Delay] is relevant because delay makes it difficult to justify granting temporary injunctive relief when that relief may not be "any more effective than a final Board order" several months after the alleged unfair labor practices have occurred. *Id.* The district court did not examine the delay for delay's own sake or craft any kind of bright line rule, but rather viewed the delay as further evidence that the Union's

> organizational drive was not likely to gain any additional marginal benefit from temporary injunctive relief as opposed to a final Board order.

N.L.R.B. v. Hartman and Tyner, Inc., 714 F.3d 1244, 1252 (11th Cir. 2013) (emphasis added). Similarly, as the Fifth Circuit concluded, a delay of just three months in seeking reinstatement of employees was "evidence that the detrimental effects of the discharges have already taken their toll on the organizational drive." *Boire*, 515 F.2d at 1192.

Courts have long recognized that an important factor in determining whether the relief sought by the Board under Section 10(j) is just and proper is whether a delay has effectively nullified the requested relief. In the instant case, the Board asserts that the injunction is necessary to bolster the union during bargaining. It cannot specify how exactly or why the change in job duties of Smith and discharge of Jones several years ago would have any impact on organizing or bargaining activities. Instead, in the time that has passed since the alleged unfair labor practices, the union has been certified and recognized, and bargaining is underway. The union is not likely to gain any additional benefit from a continued injunction in this case. As a result, there is no danger or urgent need to sidestep the Board's administrative process, which is currently underway.

III. THE DISTRICT COURT ERRED IN FINDING REASONABLE CAUSE TO SUPPORT A 10(J) INJUNCTION.

While the Board's burden with respect to the reasonable cause inquiry is

minimal, it is more than nothing. Specifically, "the Board's legal theory underlying the allegations of unfair labor practices [must] be 'substantial and not frivolous' and [] the facts of the case [must] be consistent with the Board's legal theory." *Glasser v. ADT Sec. Servs., Inc.*, 379 F. App'x 483, 486, 2010 WL 2196084 (6th Cir. 2010). In other words, while courts are not to adjudicate the merits of the case in a 10(j) proceeding, the facts presented must still support the non-frivolous legal theory asserted by the Board. It is not enough for the Board to advance a legal theory without factual support. But that is exactly what has happened here.

In its brief, the Board asserts a number of reasons to find reasonable cause to support a 10(j) injunction. With respect to Smith, the Board asserts a bevy of evidence that it contends justifies the District Court's injunction, and more specifically, that Smith's change in job duties resulted in more arduous working conditions. In the January 29, 2015 Order, the District Court's analysis regarding Smith, if it can be called as much, is a two-paragraph restatement of the facts alleged by OHL and the Board, followed by a single-sentence conclusion that the court found sufficient evidence to support the Board's legal theory. (Order Granting Petition for Temporary Injunction, Doc. 30, pp. 14-15). The District Court provided no further explanation in its later indicative ruling, instead simply rejecting the ALJ's decision. (Order on Motions for Indicative Ruling on Disputed Issues, Doc. 52, pp. 9-10). Needless to say, neither order contains the reasoning

espoused by the Board in support of injunctive relief as to Smith.

Likewise, the Board attempts to assert a post hoc justification for the District Court's injunction as to Jones. However, despite including Jones as part of the relief in the Order, the January 29, 2015 Order fails entirely to set forth any evidence or analysis upon which this Court could even review a finding of reasonable cause. In fact, Jones is mentioned just five times in the January 29, 2015 Order - once in passing in the Statement of Facts, twice in referencing the applicable NLRB Charges, and twice in the relief section of the Order. (Order Granting Petition for Temporary Injunction, Doc. 30, pp. 2, 3, 24). Nowhere did the District Court analyze reasonable cause as to Jones, nor did it identify the evidence for a reasonable cause finding. Without evidence or analysis supporting reasonable cause, the District Court could not enter an injunction.

Even after the ALJ's decision that the allegations regarding Smith and Jones should be dismissed, the District Court still failed to explain its conclusion that reasonable cause remained to warrant an injunction. The District Court's analysis was little more than cursory, stating in each instance only that "[t]he Court has reviewed the ALJ's decision, including the credibility determinations, as well as, the arguments of counsel during the motion hearing, and finds no reason to further amend the 10(j) order." (Order on Motions for Indicative Ruling on Disputed Issues, Doc. 52). The District Court also referred to the Tennessee Uniform

Administrative Procedure Act in its ruling, which is inapplicable to this action. *Id*. at p. 4. The District Court did not engage in any analysis of the ALJ's decisions, which further shows that no reasonable cause existed to justify an injunction.

The ALJ is the only fact-finder to have heard and considered testimony and weighed credibility in this case. The ALJ concluded that Ms. Shannon Miles, the decisionmaker with respect to Jones's discharge, was credible and that she had no knowledge of any alleged protected activity. The ALJ also found OHL's witnesses credible regarding Smith's change in job duties, finding that Smith's new job duties were not more arduous. The Board may disagree with those conclusions, but it is not up to the Board or the District Court to simply reject those findings without any substantive analysis or explanation whatsoever. The Board must not be permitted to simply substitute its judgment in place of the ALJ's as to the facts and credibility determinations. The injunction was not founded upon reasonable cause and should therefore be dissolved in order to allow the Board's ordinary administrative procedures to proceed.

IV. CONCLUSION

For all of the foregoing reasons, as well as those set forth in its opening Brief, OHL respectfully requests that the Court reverse the temporary injunction imposed by the District Court and dismiss the NLRB's petition.

Respectfully submitted,

Ben H. Bodzy (23517)
bbodzy@bakerdonelson.com
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
211 Commerce Street, Suite 800
Baker Donelson Center
Nashville, TN 37201
Telephone: (615) 726-5640
Fax: (615) 744-5640

By: s/ Ben H. Bodzy
Attorney for
Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2017 a copy of the foregoing Reply Brief of Plaintiffs-Appellants was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular United States mail, postage prepaid. Parties may access this filing through the Court's electronic filing system.

/s Ben H. Bodzy
Ben H. Bodzy